

JUDGES' BENCHBOOK OF THE BLACK LUNG BENEFITS ACT



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SUPPLEMENT TO JUDGES' BENCHBOOK: BLACK LUNG BENEFITS ACT

**[to be placed behind the *Supplement* tab]
[discard prior supplement]**

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Chapter 3

General Principles of Weighing Medical Evidence

II. Rules of general application

C. The “hostile-to-the-Act” rule

Citation updated: *Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.).¹

IV. Pulmonary function (ventilatory) studies

C. Determination of reliability or conformity

Citation correction: *Gambino v. Director, OWCP*, 6 B.L.R. 1-134 (1983).

VI. Medical reports

B. Undocumented and unreasoned opinion of little or no probative value

It is proper for an ALJ to “discredit a medical opinion based on an inaccurate length of coal mine employment.” *Worhach v. Director, OWCP*, 17 B.L.R. 1-105 (1993) (per curiam) (physicians reported an eight year coal mine employment history, but the ALJ only found four years of such employment).

C. Physicians’ qualifications

1. Treating or examining physician

a. Prior to applicability of December 2000 regulations

In *Consolidation Coal Co. v. Director, OWCP [Held]*, 314 F.3d 184 (4th Cir. 2002), the court held that it was improper to accord “great weight” to the opinion of a physician merely because he treated Claimant and examined him each year over the past ten years. The court stated the following:

The ALJ’s treatment of Dr. Tsai (Claimant’s treating physician) was inconsistent with the law. In *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093 (4th Cir. 1993), we

¹ On January 23, 2003, this Office was informed by the Board that an *Errata* was issued in this case changing it from a “Published” to an “Unpublished” decision.

clearly stated that “[n]either this circuit nor the Benefits Review Board has ever fashioned either a requirement or a presumption that treating or examining physicians’ opinions be given greater weight than the opinions of other expert physicians. (citations omitted). That statement is still true today. Thus, while Dr. Tsai’s opinion may have been entitled to special consideration, it was not entitled to the great weight accorded it by the ALJ.

In *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511 (6th Cir. 2002)², the court held that the ALJ properly accorded greater weight to the opinion of the miner’s treating physician, who examined the miner on numerous occasions from 1981 through 1989, as opposed to the opinions of employer’s physicians who never examined the miner or who only examined the miner once in 1981. Citing to *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993), the court stated that the opinions of treating physicians are not “presumed” to be entitled to greater weight, but they must be “properly weighed and credited.” Further, although the court found that the amended regulatory provisions at 20 C.F.R. § 718.104(d) were not directly applicable because the evidence was developed prior to January 19, 2001, it did state that these provisions were “instructive.” In particular, the amended regulations provide that:

In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer’s decision to give that physician’s opinion controlling weight, provided that the weight given to the opinion of a miner’s treating physician shall be on the credibility of the physician’s opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

Slip op. at 10.

In *Jericol Mining, Inc. v. Director, OWCP [Napier]*, 301 F.3d 703 (6th Cir. 2002), the court cited to its decision in *Stephens*, which is summarized above, to hold that the factors set forth at 20 C.F.R. § 718.104(d)(5) (2001) “are relevant for determining the appropriate weight that should be assigned to the opinions of treating physicians.” However, the court concluded that the ALJ did not properly discuss each of the factors before according the treating physician’s opinions greater weight, *i.e.* nature and duration of relationship and frequency and extent of treatment. The court then determined that “the same factors that justify placing greater weight on the opinions of a treating physician are appropriate considerations in determining the weight to be given an examining physician’s views.” In this vein, the court concluded that the ALJ did not provide sufficient reasoning

² The employer, in *Peabody Coal Co. v. Director, OWCP [Groves]*, Case No. 02-249, filed a writ of certiorari to the United States Supreme Court arguing that the “treating physician rule,” as set forth in the Sixth Circuit case law and at 20 C.F.R. § 718.104(d) (2001), is improper. In its petition, employer further states at footnote 1 that “[n]o petition for a writ of certiorari will be filed” with regard to the D.C. Circuit Court’s decision in *National Mining Ass’n. v. Dep’t. of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

to accord greater weight to the opinion of Dr. Baker, who examined the miner four times over a four year period of time, as opposed to the opinion of Dr. Dahhan, who examined the miner twice over the same time period. The court noted that the “problem with the ALJ’s analysis is that he did not specifically consider whether the four annual examinations by Dr. Baker were materially different from the two examinations that Dr. Dahhan performed during the same time frame.” The court reasoned that this would render claimants unable to “‘stack the deck’ by frequently visiting a physician who provided a favorable diagnosis, and then arguing that the opinion of that examining physician should automatically be accorded greater weight.”

In *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002), the Sixth Circuit held that it was proper for the ALJ to accord greater weight to the opinion of a miner’s treating physician. Citing to its decision in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993), the court stated that treating physicians’ opinions may be entitled to greater weight than the opinions of other physicians of record, but it noted that ALJs “‘are not required to credit treating doctors’ opinions either standing alone or where there is conflicting proof in the record.’” The court cited to the amended regulatory provisions at 20 C.F.R. § 718.104(d)(5) (2000) which provide that weight accorded to the treating physician’s opinion must “also be based on the credibility of the physician’s opinion in light of its reasoning and documentation” and “other relevant evidence as a whole.”

In *Gray v. Peabody Coal Co.*, Case No. 01-3083 (6th Cir. Apr. 19, 2002)(unpublished), the Sixth Circuit held that the ALJ erred in according greater weight to the consultative opinions of Drs. Fino and Branscomb over the opinion of a treating physician on grounds that Drs. Fino and Branscomb had superior credentials. Citing to *Tussey v. Island Creek Coal Co.*, 9982 F.2d 1036 (6th Cir. 1993), the court held that an ALJ may discount a treating physician’s opinion if it is “not well reasoned or well documented, or is problematic in some other way.” However, the court stated that “[w]here the ALJ determines that the treating physician’s opinion is well reasoned and well documented, the ALJ must give more weight to that opinion than to those of other physicians, even where those other physicians have superior qualifications.”

2. Non-examining or consultative physician

By unpublished decision in *Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001), the court upheld the ALJ’s use of the American Medical Association’s Guides to the Evaluation of Permanent Impairment to conclude that a miner’s “single breath diffusing capacity (DLCO) study was abnormal.” Turning to medical opinion evidence, the court noted that “[i]n his practice of pulmonary medicine, Dr. Rasmussen had examined some 24,000 to 25,000 miners, and the employer conceded on the record that he is an expert in his field.” Dr. Rasmussen found that the miner suffered from obstructive and restrictive impairments arising from coal dust exposure and smoking. The court determined that his opinion was supported by the objective medical data of record. On the other hand, the court agreed that Dr. Fino’s opinion was entitled to less weight. Dr. Fino concluded that the miner did not suffer from a restrictive or interstitial disease because his diffusing capacity values were normal which “rules out the presence

of clinically significant pulmonary fibrosis, and pneumoconiosis is an example of a pulmonary fibrosis.” However, the ALJ properly found that the diffusing capacity values were abnormal according to the AMA guidelines and, therefore, Dr. Fino’s conclusions were accorded less weight.

In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court upheld the ALJ’s weighing of the medical opinion evidence concluding that the ALJ properly accorded greater weight to the opinion of Dr. Cohen “particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research.” The court also found that the ALJ properly gave less weight to the opinions of Dr. Fino “based on a finding that they were not supported by adequate data or sound analysis.” Of importance, the court made reference to the comments to the amended regulations and stated the following:

Dr. Fino stated in his written report of August 30, 1998 that ‘there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.’ (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions ‘are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.’

Slip op. at n. 7.

Citation updated: *Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.).³

3. Criminal conviction of the physician

See also *Middlecreek Coal Co. v. Director, OWCP*, 91 F.3d 132 (4th Cir. 1996); *Matney v. Lynn Coal Co.*, 995 F.2d 1063 (4th Cir. 1993).

D. Equivocal or vague conclusions

In *Kentland Elkhorn Coal Corp. v. Director, OWCP [Hall]*, 287 F.3d 555 (6th Cir. 2002), the Sixth Circuit applied the amended regulatory provisions at 20 C.F.R. § 718.204(b) (2002) and affirmed the ALJ’s finding that the miner’s total disability was due to coal workers’ pneumoconiosis. In so holding, the court concluded that the ALJ properly accorded greater weight to the opinions of Drs. Saha, Younes, and Sikder over the contrary opinion of Dr. Fino on grounds that Dr. Fino’s opinion was equivocal or vague. In particular, Dr. Fino concluded that the degree of the miner’s obstruction could not be determined, but then concluded that the miner could return to his usual coal mine work. The court found that Dr. Fino’s conclusion that the miner could return to his previous coal mine employment to be problematic given that Dr. Fino stated that he could not measure the level of the miner’s obstruction. On the other hand, the court found that each of the remaining

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physicians conducted a “thorough examination” of the miner and found that he was totally disabled. The court noted that, “[c]ombined with the fact that Hall’s previous work in the coal mines required heavy exertion and exposure to large amounts of dust, the ALJ properly concluded that Hall was totally disabled as 20 C.F.R. § 718.204(b)(1) defines that term.”

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), a case arising under Part 727, the court held that the ALJ properly discredited the opinion of Dr. Meyers as too equivocal. The court noted that Dr. Meyers found that the miner suffered from a “significant limitation,” but “it appeared more cardiac than pulmonary.”

E. Silent opinion

As a point of clarification, in *Toler v. Eastern Assoc. Coal Co.*, 43 F.2d 109 (4th Cir. 1995), the Fourth Circuit held that it was “clear” that a physician’s opinion regarding disability causation carries little weight if s/he has not diagnosed pneumoconiosis contrary to the ALJ’s finding of the disease:

At the very least, an ALJ who has found (or has assumed *arguendo*) that a claimant suffers from pneumoconiosis and has total pulmonary disability may not credit a medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor’s judgement on the question of disability causation does not rest upon her disagreement with the ALJ’s finding as to either or both of the predicates in the causal chain.

However, in *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995), the court carefully circumscribed the *Toler* holding. In this vein, the Fourth Circuit noted that the concept of “legal” pneumoconiosis at 20 C.F.R. § 718.201 is broader than the phrase “coal workers’ pneumoconiosis”:

First, § 718.201 includes coal workers’ pneumoconiosis as only one of several possible ailments which could satisfy the legal definition of pneumoconiosis. Furthermore, the comparative breadth of the legal definition contained in § 718.201 is indicated by its inclusion of certain disorders which medically are different from pneumoconiosis.

...

Although all of the disorders explicitly mentioned in § 718.201 are medically similar, what is important is that a medical diagnosis finding no coal workers’ pneumoconiosis is not equivalent to a legal finding of no pneumoconiosis. Clearly, the legal definition of pneumoconiosis contained in § 718.201 is significantly broader than the medical definition of coal workers’ pneumoconiosis.

As a result, the court held that it was improper to accord little weight to the opinions of physicians who concluded that the miner did not suffer from coal workers' pneumoconiosis contrary to the ALJ's findings that the miner suffered from the disease as defined at § 718.201 of the regulations. Specifically, the court stated that "the medical conclusions of Drs. Sargent and Kress that Hobbs is not impaired by coal workers' pneumoconiosis do not necessarily conflict with the ALJ's legal conclusion that Hobbs suffers from pneumoconiosis." The court found that Drs. Sargent and Kress attributed the miner's respiratory problems to coal dust exposure, but they concluded that his disability arose from skeletal problems rather than from pneumoconiosis. *See also Dehue Coal Co. v. Director, OWCP [Ballard]*, 65 F.3d 1189 (4th Cir. 1995) (physicians concluded that smoking-induced lung cancer caused the miner's respiratory or pulmonary impairment and that the miner did not suffer from coal workers' pneumoconiosis; this was not contrary to the ALJ's finding that the miner suffered from simple pneumoconiosis within the meaning of § 718.201 such that physicians' opinions entitled to consideration; coal workers' pneumoconiosis is only one of many ailments which would satisfy the legal definition of pneumoconiosis).

In *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002), the court held that the ALJ erroneously accorded greater weight to the opinions of Drs. Castle and Dahhan, who found that the miner's disability was not caused by coal workers' pneumoconiosis, because the physicians concluded that the miner did not suffer from the disease contrary to the ALJ's findings. Citing to *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court stated the following:

[A]n ALJ who has found (or has assumed *arguendo*) that a claimant suffers from pneumoconiosis and has total respiratory disability may not credit a medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the questions of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates in the causal chain.

The fact that Drs. Dahhan and Castle stated that their opinions would not change even if the miner suffered from pneumoconiosis did not alter the court's position that the opinions could carry little weight pursuant to its holding in *Toler*:

Both Dr. Dahhan and Dr. Castle opined that Scott did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure. Thus, their opinions are in direct contradiction to the ALJ's finding that Scott suffers from pneumoconiosis arising out of his coal mine employment, bringing our requirements in *Toler* into play. Under *Toler*, the ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at most.

Indeed, the court found that the opinions of Drs. Dahhan and Castle could not outweigh a contrary

“poorly documented” opinion linking the miner’s disability to his pneumoconiosis, because the contrary opinion was based on a finding of coal workers’ pneumoconiosis consistent with the ALJ’s findings.

In *Abshire v. D&L Coal Co.*, 22 B.L.R. 1-___, BRB No. 01-0827 BLA (Sept. 30, 2002)(en banc), the Board held that, although Dr. Broudy based his opinion regarding the etiology of the miner’s total disability on a finding that the miner did not suffer from coal workers’ pneumoconiosis, it was error for the ALJ to accord the opinion less probative value where Dr. Broudy also “opined that even if claimant suffered from coal workers’ pneumoconiosis, his opinion with respect to claimant’s pulmonary difficulties would not change.”

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the court held that the ALJ properly discounted Dr. Tuteur’s opinion that pneumoconiosis did not contribute to the miner’s total disability because Dr. Tuteur’s opinion was based on a finding that the miner did not suffer from the disease, contrary to the ALJ’s findings which were supported by substantial evidence.

G. Better supported by objective medical data

By unpublished decision in *Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001), the court upheld the ALJ’s use of the American Medical Association’s Guides to the Evaluation of Permanent Impairment to conclude that a miner’s “single breath diffusing capacity (DLCO) study was abnormal.” Turning to medical opinion evidence, the court noted that “[i]n his practice of pulmonary medicine, Dr. Rasmussen had examined some 24,000 to 25,000 miners, and the employer conceded on the record that he is an expert in his field.” Dr. Rasmussen found that the miner suffered from obstructive and restrictive impairments arising from coal dust exposure and smoking. The court determined that his opinion was supported by the objective medical data of record. On the other hand, the court agreed that Dr. Fino’s opinion was entitled to less weight. Dr. Fino concluded that the miner did not suffer from a restrictive or interstitial disease because his diffusing capacity values were normal which “rules out the presence of clinically significant pulmonary fibrosis, and pneumoconiosis is an example of a pulmonary fibrosis.” However, the ALJ properly found that the diffusing capacity values were abnormal according to the AMA guidelines and, therefore, Dr. Fino’s conclusions were accorded less weight.

In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court concluded that the ALJ properly gave less weight to the opinions of Dr. Fino “based on a finding that they were not supported by adequate data or sound analysis.” Of importance, the court made reference to the comments to the amended regulations and stated the following:

Dr. Fino stated in his written report of August 30, 1998 that ‘there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.’ (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions ‘are not in accord with the prevailing view of the

medical community or the substantial weight of the medical and scientific literature.”

Slip op. at n. 7.

Citation updated: *Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.).⁴

I. Extensive medical data versus limited data

Citation correction: *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984).

M. Medical literature and studies

In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court concluded that the ALJ properly gave less weight to the opinions of Dr. Fino “based on a finding that they were not supported by adequate data or sound analysis.” Of importance, the court made reference to the comments to the amended regulations and stated the following:

Dr. Fino stated in his written report of August 30, 1998 that ‘there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.’ (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions ‘are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.’

Slip op. at n. 7.

By unpublished decision in *Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001), the court upheld the ALJ’s use of the American Medical Association’s Guides to the Evaluation of Permanent Impairment to conclude that a miner’s “single breath diffusing capacity (DLCO) study was abnormal.” A conflict arose in the interpretation of the test:

Dr. Rasmussen questioned the lower predicted value used by Dr. Bercher’s laboratory in the 1991 test, stating that he believed that the claimant’s diffusing capacity on that test would be abnormal if a higher predicted value was used. Thus, a controversy arose as to whether the claimant’s actual performance on the 1991 test was within normal or abnormal range, *i.e.*, whether the lower predicted value was in fact the appropriate or correct value against which to measure the claimant’s test result.

Id. The ALJ properly notified the parties that the AMA guidelines would be used to determine the

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proper predicted value for the test. Employer objected to the use of the AMA guides because “inter-laboratory differences” would render the AMA guidelines unreliable. The court disagreed, however, and held that the guide already takes such differences into account. Consequently, the court concluded that “the employer had adequate notice yet offered no specific evidence to show that the use of the AMA guide was unfair or inaccurate when applied to the case at hand.”

By unpublished decision in *Bethenergy Mines, Inc. v. Director, OWCP [Rowan]*, Case No. 01-2148 (4th Cir. Sept. 4, 2002), the Fourth Circuit upheld the ALJ’s finding that Dr. Rasmussen’s opinion that the miner’s centrilobular emphysema was caused by, or aggravated by, coal dust exposure was entitled to greater weight than contrary opinions of record. The court stated the following:

The ALJ explained that he found Dr. Rasmussen’s testimony most persuasive because Dr. Rasmussen offered extensive research to support his opinion. Dr. Rasmussen cited seven articles from medical journals and six epidemiologic studies to support his position. No other doctor offered such extensive research.

In his opinion, ALJ Burke offered concrete reasons for discounting the opinions of other doctors who were critical of Dr. Rasmussen. He noted that Dr. Renn’s testimony lacked the ‘definitiveness to outweigh the better reasoned and better supported report of Dr. Rasmussen.’ Dr. Kleinerman’s disagreement with the medical experts Dr. Rasmussen cited, were ‘in the most general of terms.’ Dr. Kleinerman did not ‘critique any particular study or any specific data behind a study.’

Furthermore, the ALJ found that Dr. Fino’s criticisms of studies cited by Dr. Rasmussen are ‘insufficient to dismiss the studies that support Dr. Rasmussen’s opinion,’ because while Dr. Fino disputed the ‘underlying data’ of studies offered by Dr. Rasmussen, he did not specify which studies of Dr. Ruckley had evidentiary problems. Further, the ALJ stated that, ‘Dr. Fino doesn’t contend that Dr. Rasmussen is incorrect in his interpretation of a study . . . supporting the relationship between coal dust exposure and centrilobular emphysema.’ While Dr. Fino discussed a more recent study that purported to support his position, he did not ‘identify the study by title or author.’

Slip op. at 8 (citations omitted).

N. CT-scan evidence [new]

In *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885 (7th Cir. 2002), the Seventh Circuit upheld the ALJ’s award of benefits. In reaching this determination, the court rejected Employer’s argument that “[d]espite the fact that two qualified B-readers (including a board certified radiologist) determined that Stein’s x-rays were positive, . . . Dr. Bruce’s negative reading of Stein’s CT scan (is) conclusive because it ostensibly is the most ‘sophisticated and sensitive diagnostic test’

available.” Citing to comments underlying the amended regulations, the court noted that the Department has rejected the view that a CT-scan, by itself, “is sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis.” 65 Fed. Reg. 79, 920, 79, 945 (Dec. 20, 2000). The court concluded that the ALJ reasonably accorded less weight to the negative CT-scan interpretation by a physician without any radiological qualifications as compared to the positive chest x-ray interpretations by physicians who are B-readers, and one physician who has also a board-certified radiologist.

O. Reliance on testing which is later interpreted to the contrary [new]

In *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-___, BRB No. 01-0728 BLA (Sept. 24, 2002)(en banc), the Board held that the ALJ “did not reconcile (a) physician’s diagnosis of pneumoconiosis, based upon the positive x-ray and the miner’s significant duration of coal dust exposure, with the fact that Dr. Baker’s positive interpretation was reread as negative by a physician with superior qualifications.” As a result, the Board directed that the ALJ “address whether this rereading impacts the physician’s opinion and his diagnosis of pneumoconiosis.”

II. Autopsy reports

A. Principles of weighing autopsy evidence

In *Thomas v. Director, OWCP*, BRB No. 01-0308 BLA (Dec. 11, 2001) (unpub.),⁵ the Board held that it was proper to discredit Dr. Jones’s opinion based on his review of autopsy slides because it ““was totally at variance with the findings reported by Drs. Potter and Green.””

In *Livermore v. Amax Coal Co.*, 297 F.3d 668 (7th Cir. 2002), the Seventh Circuit upheld the ALJ’s finding that coal workers’ pneumoconiosis did not hasten the miner’s death based on autopsy evidence because “the ALJ reviewed all the opinions, qualifications of the experts, and resolved the conflicting reports in a thorough and logical manner.”

In *Consolidation Coal Co. v. Director, OWCP [Kramer]*, 305 F.3d 203 (3d Cir. 2002)⁶, the court upheld the ALJ’s award of benefits based on a preponderance of the autopsy evidence. Employer maintained that the ALJ improperly considered an autopsy report which did not contain a microscopic description of the lungs in violation of the quality standards at 20 C.F.R. § 718.106(a). Citing to the Board’s decision in *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113, 1-114 and 1-115

⁵ On January 23, 2003, this Office was informed by the Board that an *Errata* was issued in this case changing it from a “Published” to an “Unpublished” decision.

⁶ The court noted that the parties stipulated in briefs before the ALJ that the miner was last employed in the coal mines in West Virginia, which falls within the jurisdiction of the Fourth Circuit. However, Employer appealed in the Third Circuit based on Claimant’s previous coal mine employment in Pennsylvania. The Third Circuit considered the appeal on the merits, but cited to Fourth Circuit, as well as its own, case law.

(1988), the court concluded that, “[a]lthough the regulations require that the report include a microscopic description of the lungs, they contain no express requirements in the form or nature thereof.” The court noted that the autopsy report “stated that the microscopic findings were ‘consistent with’, *i.e.*, confirmed, the gross autopsy findings, and incorporated by reference the detailed findings contained elsewhere in the report.” As a result, the court concluded that the autopsy report was in compliance with § 718.106 of the regulations.

Chapter 4
Limitations on Admission of Evidence

C. Dismissal by the administrative law judge not permitted

If multiple operators are listed on referral from the district director, the comments to the regulations state that the administrative law judge would be permitted to dismiss the operators *at any time*. 65 Fed. Reg. 80,004 (2000). The plain language of the regulations at § 725.418(d), however, seems to require that the Director consent to such dismissals. 20 C.F.R. § 725.418(d) (2000).

Chapter 5
What Is The Applicable Law?

I. Overview of the Black Lung Benefits Act

B. December 2000 regulatory amendments, effective dates of

Updated citation: *National Mining Ass'n. et al v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

Chapter 6

Definition of Coal Miner and Length of Coal Mine Employment

III. Length of coal mine employment

A. Prior to applicability of December 2000 regulations

3. The 125-day rule

Applying the pre-amendment regulations at 20 C.F.R. § 725.101(a)(32) in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court utilized the 125-day rule to determine the miner's length of coal mine employment. In satisfying this requirement, the court stated the following:

Summers was not required to establish that he worked underground for more than 125 days per annum. *See Landes v. Director, OWCP*, 997 F.2d 1192, 1198 (7th Cir. 1993) (quoting *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989)). Nor did he have to prove that he was around surface coal dust for a full eight hours a day on any given day for that day to count towards the 125-day total. (citation omitted). All that Summers had to show was that he worked 'in or around a coal mine' for any part of 125 days in a calendar year, for a total of 15 years. This he unquestionably did, by demonstrating that he was exposed to worked-related dust five or six days each week from May 1948 to April 1965 and from April 1975 to October 1980. On this record, we conclude that the ALJ properly invoked the 15-year presumption.

In *ARMCO, Inc. v. Martin*, 277 F.3d 468 (4th Cir. 2002), the court applied the pre-amendment provisions at 20 C.F.R. § 725.493(a)(1) (1999) to hold that the 125-day rule may only be used to determine the proper responsible operator and it cannot be used to determine the claimant's length of coal mine employment for purposes of the entitlement presumptions at 20 C.F.R. § 718.301.⁷ In this vein, the court noted that 20 C.F.R. § 725.493(b) (1999) provides a two-step inquiry in determining whether the named operator is properly responsible for the payment of benefits:

Under the first step, a court must determine whether a miner worked for an operator for 'a period of one year, or partial periods totaling one year.' 20 C.F.R. § 725.493(b) (1999). If the court determines that this one-year requirement has been met, it must then undertake the second inquiry of whether a miner's employment during that one year was 'regular,' *i.e.* whether, during the one year, the miner 'was

⁷ Although the amended regulatory provisions were not applicable, the court stated that the new regulations clarified the earlier regulatory provisions and the court's holding was consistent with the amended provisions. *Id.* at 475.

regularly employed in or around a coal mine.’

Id. at 474. In particular, the court found that the “regulations provide that responsible operator liability does not arise unless an operator employed a miner for one calendar year during which the miner regularly worked for that operator, defining ‘regularly worked’ to be a minimum of 125 days.” In support of its position, the court cited to Board and circuit court decisions which reached the same result: *Croucher v. Director, OWCP*, 20 B.L.R. 1-68, 1-72 to 1-73 (1998); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 876 (10th Cir. 1996); and *Director, OWCP v. Gardner*, 882 F.2d 67, 71 (3rd Cir. 1989). The court noted that the Third Circuit explained that:

This two-step inquiry means that ‘the one-year employment requirement sets a floor for the operator’s connection with the miner, below which the operator cannot be held responsible for the payment of benefits. The 125 day limit relates to the minimum amount of time the miner may have been exposed to coal dust while in the employment by the operator.’ (citation omitted).

Id. at 475. In so holding, the court rejected the position taken by the Seventh and Eighth Circuits in *Landes v. Director, OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) and *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989) that, if a miner works for 125 days, then s/he will be credited with one year of coal mine employment for purposes of 20 C.F.R. § 725.301 (1999).

E. Periods included in computing length of coal mine employment

1. Vacation time

a. Prior to applicability of December 2000 regulations

Substitute the citation of *Elswick v. New River Co.*, 2 B.L.R. 1-1109 (1980) (allowing inclusion of vacation time) for the citation of *Van Nest v. Consolidation Coal Co.*, 3 B.L.R. 1-526 (1981), *rev’d on other grounds*, 705 F.2d 460, Case Nos. 81-3411 and 81-3463 (6th Cir. 1982)(unpub.).

b. After applicability of December 2000 regulations

Citation correction: Citation to 20 C.F.R. § 725.301 should be changed to § 718.301.

2. Sick time

b. After applicability of December 2000 regulations

Citation correction: Citation to 20 C.F.R. § 725.301 should be changed to § 718.301.

Chapter 7

Designation of Responsible Operator

V. Requirements of responsible operator designation

F. Cumulative employment of one year or more

[See also cases cited in Chapter 6, Section III.E]

In *Kentland Elkhorn Coal Corp. v. Director, OWCP [Hall]*, 287 F.3d 555 (6th Cir. Apr. 24, 2002), the Sixth Circuit initially found that Desperado Fuels was not the responsible operator as it did not employ Claimant for a period of one year. In so holding, the court concluded that time spent receiving disability benefits should be excluded in computing the length of time Claimant worked for Employer. Specifically, the miner worked for Desperado Fuels from March 6, 1989 to July 7, 1989. He suffered a work-related injury and received disability benefits from July 8, 1989 until June 12, 1990. The court held that the time period during which the miner received disability benefits could not be used to satisfy the requirement of one year of employment with Desperado Fuels. Distinguishing the Board's holding in *Boyd v. Island Creek Coal Co.*, 8 B.L.R. 1-458 (1986), the court noted that the miner in *Boyd* was kept on the payroll after his injury and continued to work for the employer after the injury. In the present case, Claimant quit working for Desperado Fuels after his injury and he did not even work for the company for 125 days prior to his injury.

The court then determined that the ALJ erroneously dismissed the other named operators—Coleman and Grassy Creek. Upon review of the evidence, the court concluded that these entities had a predecessor/successor relationship and the Claimant worked for the entities for more than one year. However, because the claim was “fully litigated on the merits” and Claimant was determined to be entitled to benefits, the court found that the parties would be prejudiced by a remand to the ALJ to designate Coleman/Grassy Creek as the proper responsible operator. As a result, the court dismissed Kentland from the case and held that the Black Lung Disability Trust Fund was liable for the payment of benefits.

J. Due process rights of the employer violated; Trust Fund held liable for payment of benefits

2. Delay in notice of claim

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the court concluded that a 16 year delay in the adjudication of the miner's claim—from the time of the 1978 filing to the 1994 order by the Board to “start afresh”—did not constitute a violation of Employer's due process rights. As a result, Employer's request to transfer liability to the Black Lung Disability Trust Fund was denied. Citing to *C&K Coal Co. v. Taylor*, 165 F.3d 254 (3d Cir. 1999), the court

noted that Employer received timely notification of the claim and had been able to develop its evidence, even though the delayed processing of the claim was “inexcusable.” The court distinguished the holdings in *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1995) and *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799 (4th Cir. 1998), where the Fourth Circuit transferred liability to the Black Lung Disability Trust Fund because of the Department’s inordinate delay in notifying the employers of the viability of a claim and their potential liability for the payment of benefits. The court noted that, in *Borda* and *Lane Hollow*, the due process rights of the employers were denied “when the defendants had not received ‘timely notice of the proceeding’” and that, under the facts in *Chubb*, “Amax received notice of, and participated in, all of the proceedings dealing with Mr. Chubb’s claim since 1978.”

Chapter 10
Living Miners' Claims: Entitlement Under Part 727

III. Rebuttal of the interim presumption of total disability due to pneumoconiosis

C. Means of rebuttal

4. The miner does not suffer from pneumoconiosis

a. Rebuttal under subsection (b)(4) precluded if invocation under subsection (a)(1)

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the Seventh Circuit held that invocation of the interim presumptions through x-ray evidence at 20 C.F.R. § 727.203(a)(1) precludes rebuttal under § 727.203(b)(4).

Chapter 11

Living Miners' Claims: Entitlement Under Part 718

III. The existence of pneumoconiosis

A. "Pneumoconiosis" defined

2. After applicability of December 2000 regulations

In *Consolidation Coal Co. v. Director, OWCP [Kramer]*, 305 F.3d 203 (3d Cir. 2002)⁸, Employer challenged that a finding that pneumoconiosis was progressive in this case because the miner's pulmonary function and blood gas studies, up to two and one-half years preceding his death, were within normal limits such that pneumoconiosis could not have hastened the miner's death. Employer noted that the miner was diagnosed with colon cancer, which had metastasized to his liver and lungs and which caused the miner's death. The court stated that "the tenet that pneumoconiosis is non-progressive is simply inconsistent with the 'assumption of [disease] progressivity that underlies much of the statutory regime.'" Moreover, the court stated that, even assuming that the disease was not progressive, the absence of a "clinically significant" pulmonary impairment two and one-half years prior to the miner's death "certainly does not establish that Kramer had incurred no damage to his lung tissue and no pulmonary burden of any degree whatsoever as a result of his occupational exposure." The court further noted that "nothing in the evidence that Consolidation points to would negate the conclusion that a preexisting pulmonary burden, albeit insufficient standing alone to result in measurable loss of lung function, could nonetheless in combination with a further affront to the pulmonary system through advancing cancer have decreased to some degree the lungs' ability to continue to compensate."

3. Evidence relevant to finding pneumoconiosis

a. Anthracosis and anthracotic pigment

By unpublished decision in *Taylor v. Director, OWCP*, BRB No. 01-0837 BLA (July 30, 2002) (unpublished), the Board noted that a physician concluded, on autopsy, that no coal workers' pneumoconiosis was present and, yet he also stated that there was "minimal anthracosis in the mediastinal lymph nodes." As a result, the Board remanded the case to the ALJ to determine whether the legal definition of pneumoconiosis at 20 C.F.R. § 201, which includes anthracosis, was satisfied. The Board held that "anthracosis found in lymph nodes may be sufficient to establish the existence

⁸ The court noted that the parties stipulated in briefs before the ALJ that the miner was last employed in the coal mines in West Virginia, which falls within the jurisdiction of the Fourth Circuit. However, Employer appealed in the Third Circuit based on Claimant's previous coal mine employment in Pennsylvania. The Third Circuit considered the appeal on the merits, but cited to Fourth Circuit, as well as its own, case law.

of pneumoconiosis.”

Updated citation: *Hapney v. Peabody Coal Co.*, 22 B.L.R. 1-106 (2001)(en banc).

B. Regulatory methods of establishing pneumoconiosis

3. Evidence under all sections must be weighed together

In *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-__, BRB No. 01-0728 BLA (Sept. 24, 2002)(en banc), a case arising in the Sixth Circuit, the Board declined to apply the Fourth Circuit’s holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), which required that a determination of the presence of pneumoconiosis be based on weighing all types of evidence under 20 C.F.R. § 718.202 together. Rather, the Board noted that “the Sixth Circuit has often approved the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis.” *See also Consolidation Coal Co. v. Director, OWCP [Held]*, 314 F.3d 184 (4th Cir. 2002).

C. Presumptions related to the existence of pneumoconiosis

1. Complicated pneumoconiosis

In *Braenovich v. Cannerton Industries, Inc.*, __ B.L.R. __, BRB No. 02-0365 BLA (Feb. 12, 2003), the Board upheld the ALJ’s “equivalency determination” that a 1.5 centimeter lesion on autopsy would constitute a 1.0 centimeter or greater opacity on a chest x-ray, thus establishing the presence of complicated pneumoconiosis under 20 C.F.R. § 718.304. In support of the ALJ’s finding, the Director argued that the autopsy prosector and a reviewing pathologist found a lesion larger than one centimeter in the miner’s lungs. The Director stated that, although another reviewing pathologist, Dr. Naeye, found a 0.9 centimeter lesion on the slides, this would not “disprove the existence of a nodule larger than one centimeter in the miner’s lungs.” The Director noted that one of Employer’s experts, Dr. Kleinerman, “acknowledged that a tissue sample shrinks by about 10 - 15% when prepared for a slide . . .” *See also Hawker v. Zeigler Coal Co.*, __ B.L.R. __, BRB No. 99-0434 BLA (Aug. 23, 2000).

By unpublished decision in *Keene v. G&A Coal Co.*, BRB No. 96-1689 BLA-A (Sept. 27, 1996), the Board affirmed a finding of complicated pneumoconiosis under 20 C.F.R. § 718.304. It held that the ALJ properly found that a chest x-ray, in conjunction with CT-scan findings, was sufficient to find complicated pneumoconiosis. The ALJ specifically noted that physicians reviewing a CT-scan “confirm(ed) the presence of a large irregular density or mass greater than one centimeter in diameter.” The Board further held that a finding of complicated pneumoconiosis need not be accompanied by findings of Category 2 or Category 3 simple pneumoconiosis, contrary to Employer’s argument. The Board also found that the ALJ properly concluded that “Dr. Wheeler’s opinion, that claimant’s large opacity is compatible with tuberculosis, (did) not negate its compatibility with complicated pneumoconiosis.”

2. Fifteen years of coal mine employment

In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court held that the ALJ properly invoked the 15 year presumption at 30 U.S.C. § 921(c)(4) having found that the miner's work at the surface of the mine was under "conditions substantially similar to those in an underground coal mine." The ALJ found "similarity" based on the miner's un-refuted testimony about his employment conditions. The miner worked as an electrician in the mines during some of his coal mine employment but most of his work "occurred when he worked inside the offices and shops that were built above ground on the coal company's property." The court found that the miner described, in detail, the dusty conditions in his work areas and it noted the following:

Summers intermittently labored underground or in buildings located atop subterranean coal mines, performing tasks inexorably intertwined with coal production. Therefore, he is a miner, according to the regulations, and we will not require him to prove similarity in a different manner merely because he did not wield a pickaxe and a shovel while he worked.

Id.

IV. Etiology of the pneumoconiosis

In *Wisniewski v. Director, OWCP*, 929 F.2d 952 (3d Cir. 1991), the court held that an inference that the miner's pneumoconiosis was caused by coal dust exposure may be raised "if the record [affirmatively] indicates [that there was] no other potential dust exposure."

V. Establishing total disability

C. Methods of demonstrating total disability

4. Reasoned medical opinions

a. Burden of proof

Citation correction: The assessment of medical opinion evidence has been re-codified from former section § 718.204(c)(4) to the amended § 718.204(b)(2)(iv) (2000).

VI. Etiology of total disability

A. "Contributing cause" standard

In *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002), the court held that the ALJ erroneously accorded greater weight to the opinions of Drs. Castle and Dahhan, who found that the

miner's disability was not caused by coal workers' pneumoconiosis, because the physicians concluded that the miner did not suffer from the disease contrary to the ALJ's findings. Citing to *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court stated the following:

[A]n ALJ who has found (or has assumed *arguendo*) that a claimant suffers from pneumoconiosis and has total respiratory disability may not credit a medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the questions of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates in the causal chain.

The fact that Drs. Dahhan and Castle stated that their opinions would not change even if the miner suffered from pneumoconiosis did not alter the court's position that the opinions could carry little weight pursuant to its holding in *Toler*:

Both Dr. Dahhan and Dr. Castle opined that Scott did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure. Thus, their opinions are in direct contradiction to the ALJ's finding that Scott suffers from pneumoconiosis arising out of his coal mine employment, bringing our requirements in *Toler* into play. Under *Toler*, the ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at most.

Indeed, the court found that the opinions of Drs. Dahhan and Castle could not outweigh a contrary "poorly documented" opinion linking the miner's disability to his pneumoconiosis, because the contrary opinion was based on a finding of coal workers' pneumoconiosis consistent with the ALJ's findings.

2. After applicability of December 2000 regulations

In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit interpreted the amended provisions at 20 C.F.R. § 718.204(c) (2000), which provide that pneumoconiosis is a "substantially contributing cause" to the miner's total disability if it:

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c) (2000). Under the facts presented to the court, Employer argued that the miner's chronic obstructive pulmonary disease "was primarily, if not entirely, a consequence of the estimated quarter-of-a-million cigarettes he had smoked." Said differently, Employer maintained that "there is no substantial evidence that Kirk's total disability, which was not caused by pneumoconiosis in 1988, had suddenly become caused by this disease in 1992." The court found that, under the

amended regulatory provisions, the mere fact that Claimant's non-coal dust related respiratory disease would have left him totally disabled even without exposure to coal dust, this would not preclude entitlement to benefits. The court held that Claimant "may nonetheless possess a compensable injury if his pneumoconiosis 'materially worsens' this condition."

By unpublished decision in *Pittsburgh & Midway Coal Mining Co. v. Sanchez*, 2001 WL 997947, Case No. 00-9538 (10th Cir. Aug. 31, 2001), the court declined to apply the causation standard set forth in the amended regulations at 20 C.F.R. § 718.204(c)(1) and stated, in a footnote, that "[a]s petitioners concede, . . . we apply the *Mangus* causation standard that was in effect when Sanchez filed for benefits in 1988."⁹

⁹ *Mangus v. Director, OWCP*, 882 F.2d 1527, 1531-32 (10th Cir. 1989).

Chapter 16
Survivors' Claims: Entitlement Under Part 718

II. Standards of entitlement

D. Survivors' claims filed on or after January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982

2. "Hastening death" standard

a. Prior to applicability of December 2000 regulations

Citation update: *Shuffv. Cedar Coal Co.*, 967 F.2d 977 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

Chapter 17

Onset, Augmentation, Termination, and Interest

I. Commencement of the payment of benefits

B. Claims filed on or after July 1, 1973 (Part C claims)

2. Effect of continuing employment

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the court held that the date of onset for the payment of benefits was not the date on which the miner retired from working in the coal mines. Rather, the court cited to 20 C.F.R. § 725.503 which requires that, if the date of onset cannot be determined from the medical evidence, then it is the date on which the miner filed his claim which, in this case, is August 1978. The court then noted that the miner returned to coal mine work in September 1981 for a period of one year. Pursuant to 20 C.F.R. § 725.504 (formerly 20 C.F.R. § 725.503A), the court determined that the payment of benefits would be suspended for that period of time. Employer argued that the regulatory provisions regarding onset were invalid because they were in conflict with Section 7(c) of the Administrative Procedure Act (APA). To the contrary, the court held that the regulation was valid and, under the express language of the Black Lung Benefits Act, the APA “does not trump the regulation.”

Chapter 20

Medical Treatment Dispute (BTD)

III. Treatment related to the miner's black lung condition

A. Burden of persuasion/production

2. After applicability of December 2000 regulations

In *Cornett v. Arch of Kentucky, Inc.*, BRB No. 01-0276 BLA (Nov. 28, 2001) (unpub.)¹⁰, a case arising in the Sixth Circuit, the Board upheld retroactive application of the amended medical treatment dispute regulations at 20 C.F.R. § 725.101(e) to determine whether the miner's medical bills were related to his respiratory impairment arising from coal dust exposure. Employer argued that the regulations adopted the Fourth Circuit's presumption set forth in *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492 (4th Cir. 1991) which was specifically rejected by the Sixth Circuit in *Seals v. Glen Coal Co.*, 147 F.3d 502 (6th Cir. 1998). Citing to the district court's ruling in *United Mining Ass'n. v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001), the Board upheld the validity of the revised regulation which provides that any pulmonary disorder for which treatment is required is presumed to be caused or aggravated by the miner's condition. The Board further noted that Employer's burden to defend against the "compensability of the disputed expenses" has not been altered. Turning to the merits of the case, the Board upheld the ALJ's finding that the miner's hospitalization was related to his coal dust induced lung disease notwithstanding the fact that the records did not specifically "reflect treatment for pneumoconiosis." The ALJ noted that the miner's chronic obstructive pulmonary disease and chronic bronchitis had been found to be related to coal dust exposure and, therefore, because his hospitalization records reflected treatment for such a disease, the costs were compensable. Moreover, it was proper to give little weight to Dr. Branscomb's opinion that the medical expenses were not compensable because his opinion was premised on a finding that the miner did not suffer from legal pneumoconiosis.

¹⁰ On January 23, 2003, this Office was informed by the Board that an *Errata* was issued in this case changing it from a "Published" to an "Unpublished" decision.

Chapter 23

Petitions for Modification Under § 725.310

II. Procedural issues

D. Exclusion of evidence on modification

By unpublished decision in *Andrews v. Director, OWCP*, BRB No. 02-0228 BLA (Dec. 23, 2002), a case involving a survivor's claim, the Board held that it was error for the ALJ to exclude a medical report submitted by Claimant to establish a mistake in a determination of fact under 20 C.F.R. § 725.310, where the medical report was available (and could have been submitted) at the time of the original hearing. The Board agreed with Claimant and the Director who argued that the ALJ "should not have excluded Dr. Simelaro's report from the record on the sole ground that this evidence should have been submitted in earlier proceedings."

This appears contrary to the Board's holding in *Shertzer v. McNally Pittsburgh Manufacturing Co.*, BRB No. 97-1121 (June 26, 1998)(unpub.), wherein the Board held that the ALJ erred in admitting evidence on modification as part of the Director's exhibits where the evidence was in existence at the time the ALJ issued his original decision. The Board stated that 20 C.F.R. § 725.456(d) and *Wilkes v. F&R Coal Co.*, 12 B.L.R. 1-1 (1988) "mandates exclusion of withheld evidence in the absence of extraordinary circumstances."

E. No "absolute right" to medical re-examination on modification

By unpublished decision in *Caudill v. Cumberland River Coal Co.*, BRB No. 00-1185 BLA (Sept. 26, 2001), the Board cited to its decisions in *Stiltner v. Wellmore Coal Corp.*, 22 B.L.R. 1-37, 1-40-42 (2000) (en banc) and *Selak v. Wyoming Pocahontas Land Co.*, 21 B.L.R. 1-173, 1-177-78 (1999)(en banc) to hold that it is within the administrative law judge's discretion to order that a claimant be re-examined on modification. The Board stated that the issue to be determined by the administrative law judge is whether the employer has raised a credible issue pertaining to the validity of the original adjudication such that an order compelling a claimant to submit to examinations or tests would be in the interest of justice.¹¹ Moreover, the Board held that, because the district director listed "modification" as an issue on the CM-1025, the parties need not move to amend the CM-1025 to specifically include the medical issues of entitlement. Rather, the Board concluded that a petition for modification "includes whether the ultimate fact of entitlement was correctly decided . . ."

¹¹ This holding is based on 20 C.F.R. § 718.404(b) which appears in similar form at 20 C.F.R. § 725.203(d) (2000).

IV. Review by the administrative law judge

C. Proper review of the record

1. “Change in conditions”

d. Insufficient evidence submitted

Reference correction: *Kingery, supra*.

2. “Mistake in a determination of fact”

c. Scope of evidentiary review

The United States Supreme Court, in *O’Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971), has indicated that all evidence of record should be reviewed in determining whether “a mistake in a determination of fact” has been made and the Court stated that, on modification, the fact-finder is vested “with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” See also *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *Kovac, supra*; *Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11th Cir. 1987).

In *Thomas v. Director, OWCP*, BRB No. 01-0308 BLA (Dec. 11, 2001)(unpub.)¹², the Board held that “the administrative law judge properly found the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. § 727.203(a), we affirm the administrative law judge’s finding that the evidence is insufficient to establish modification at 20 C.F.R. § 725.310 (2000).”

D. Preference for “accuracy over finality” [new]

The Seventh Circuit Court of Appeals, in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533 (7th Cir. 2002)(J. Wood, dissenting), discussed the criteria an ALJ should consider on modification.

Employer’s petition for Section 22 modification was its second. It petitioned for modification of an award of survivor’s benefits based, in part, on evidence which could have been submitted at the original hearing or during an earlier modification proceeding. The ALJ denied Employer’s petition for modification as not in the interest of justice under the Act. She reasoned that all of the evidence that Old Ben proffered or attempted to obtain in the second modification proceeding had been available during the first modification proceeding, and that a modification proceeding is not intended

¹² On January 23, 2003, this Office was informed by the Board that an *Errata* was issued in this case changing it from a “Published” to an “Unpublished” decision.

to allow a party to simply retry its case when it thinks it can make a better showing by presenting evidence that it could have, but did not present earlier. “[t]o do so would allow the Employer, under the guise of an allegation of mistake, to retry its case simply because it feels that it can make a better showing the next time around.”

Old Ben appealed to the Benefits Review Board, who affirmed the ALJ decision. The Board held that the ALJ acted within her discretion by finding that reopening the case would not render justice under the Act. The Board reasoned that Old Ben is bound by the actions of its original counsel, no matter how negligent or incompetent, and that a party dissatisfied with the actions of its freely chosen counsel has a separate action against such counsel in another forum.

Old Ben appealed to the Seventh Circuit. The Director, Office of Workers’ Compensation Programs filed a brief in support of the position of Old Ben, arguing that the ALJ and the Board applied the incorrect legal standard; that the ALJ should be required to reopen the matter and reevaluate the award of benefits. The Director argued to the Court that a timely requested modification of a mistaken decision should be denied only if the moving party has engaged in such contemptible conduct, or conduct that renders its opponent so defenseless, that it could be said that correcting the decision would not render justice under the Act.

The Seventh Circuit accepted the position of Old Ben and the Director. It found that it owed the usual deference to the Director given by Courts to agencies that interpret its own statutes and regulations. The Court cited the Supreme Court decisions in *Banks v. Chicago Grain Trimmers Ass’n*, 390 U.S. 459 (1968) and *O’Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1972), for the employment of “a broad reading of Section 22” to permit reconsideration of the ultimate question of fact without submitting any new evidence. The Court determined that the language, structure and case law interpreting Section 22 articulates a preference for accuracy over finality in the substantive award.

The Court held that “whether requested by a miner or an employer, a modification request cannot be denied out of hand based solely on the number of times modification has been requested or on the basis that the evidence may have been available at an earlier stage in the proceeding.”

The Court discussed the factors to be considered in determining whether granting modification serves justice under the Act:

...we do not believe that only sanctionable conduct constitutes the universe of actions that overcomes the preference for accuracy. For example, just as the remedial purpose of the Act would be thwarted if an ALJ were required to brook sanctionable conduct, the purpose also would be thwarted if an ALJ were required to reopen proceedings if it were clear from the moving party’s submissions that reopening could not alter the substantive award. So too, an ALJ would be entitled to determine that an employer was employing the reopening mechanism in an unreasonable effort to delay payment.

. . .

In making that determination, the ALJ will no doubt need to take into consideration many factors including the diligence of the parties, the number of times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit. These and other factors deemed relevant by the ALJ in a particular case ought to be weighed not under an amorphous “interest of justice” standard, but under the frequently articulated ‘justice under the Act’ standard, *O’Keefe*, 404 U.S. at 255. This distinction is not simply one of semantics. The latter formulation cabins the discretion of the ALJ to keep in mind the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act.

The Court reiterated that “finality simply is not a paramount concern of the Act” and a remand of the case is required because “the ALJ gave no credence to the statute’s preference for accuracy over finality . . .”

Chapter 24

Multiple Claims Under § 725.309

IV. Proper review of the record

A. Prior to applicability of December 2000 regulations– “material change in conditions”

In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit held that, under *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), it is insufficient for the ALJ to merely analyze the newly submitted evidence to determine whether an element previously adjudicated against the claimant has been established. Rather, the court stated that the ALJ must also compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence “is substantially more supportive of claimant.” Although the ALJ did not conduct a comparison of the old and new evidence to determine whether the new evidence was “substantially more supportive,” the court nevertheless affirmed the finding of “material change” as supported by the record as a whole.

VI. Affect of three year statute of limitations

In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit held that, under proper circumstances, the three year statute of limitations for filing a black lung claim at 20 C.F.R. § 725.308(c) would apply to the filing of a subsequent claim under 20 C.F.R. § 725.309. Under the facts before it, the court determined that the miner had not received a reasoned medical opinion finding him totally disabled due to pneumoconiosis which would have commenced the running of the limitation period. The court stated the following:

The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of a miner’s claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk’s 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed ‘premature’ because the weight of the evidence does not support the elements of the miner’s claim, are effective to begin the statutory period.¹³ Three years after

¹³ The court referenced a footnote at this juncture which reads as follows:

This distinction deters finding ‘compliant physicians’ willing to give the miner an overly-favorable diagnosis that cannot be supported by the weight of the medical evidence. A miner

such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Slip op. at 5 (italics in original).

By unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(unpub.)¹⁴, the Sixth Circuit held that a subsequent claim filed by a miner under 20 C.F.R. § 725.309 is not barred by the three-year statute of limitations at § 725.308(a) because denial of the miner's first claim on grounds that he did not suffer from pneumoconiosis "necessarily renders any prior medical opinion to the contrary invalid" The court reaffirmed its holding in *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), that the three year statute of limitations does apply to subsequent claims. However, the *Kirk* court also stated that prior medical opinions in the miner's favor, which were "premature" because the weight of the evidence did not support entitlement in an earlier claim, were "effective to begin the statutory period." The *Dukes* court concluded that this was *dicta* and held otherwise. Specifically, the *Dukes* court adopted the Tenth Circuit's holding in *Wyoming Fuel Co. v. Director, OWCP [Bandolino]*, 90 F.3d 1502, 1507 (10th Cir. 1996) and concluded the following:

We agree with the reasoning of the Tenth Circuit and likewise expressly hold that a mis-diagnosis does not equate to a 'medical determination' under the statute. That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes. If he later contracts the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, this statute of repose does not commence until a *proper* medical determination.

Slip op. at 5.

In *Ferguson v. Jericol Mining, Inc.*, 22 B.L.R. 1-__, BRB No. 01-0728 BLA (Sept. 24,

who develops total disability due to pneumoconiosis three years after such a premature determination will find that the 'friendly doctor' has done him no favor. Indeed, the chief danger with this rule, even given the constraint of communication to the miner, could be that '[u]nscrupulous employers could conveniently avoid all liability' by purposely making premature determinations. (Gov't. Br. at 37 n. 12). We have no occasion in this case to address the risk-benefit ratio of such an illegal tactic (or the Director's extraordinary cynicism regarding America's coal industry).

¹⁴ On October 21, 2002, the Director filed a *Motion for Publication of Unpublished Opinion* with the Sixth Circuit and requested that the court's decision in *Dukes* be published.

2002)(en banc)¹⁵, a case arising in the Sixth Circuit, the Board remanded the case for a determination of whether the statute of limitations applied to the miner's subsequent claim which was filed under 20 C.F.R. § 725.309. Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), which was issued after the ALJ issued his decision and order, Employer argued that the miner's claim was time-barred pursuant to 20 C.F.R. § 725.308 because it was not filed within three years of the date that Dr. Kabani's medical determination of total disability due to pneumoconiosis was communicated to the miner. The Board initially noted that there is a presumption that every claim for benefits is timely filed, but Employer has the opportunity to rebut that presumption. It concluded that the ALJ must determine: (1) whether Dr. Kabani's opinion meets the requirements of 20 C.F.R. § 725.308(a); and (2) whether a medical opinion which meets the requirements of § 725.308, but like Dr. Kabani's opinion is rejected as unpersuasive in a prior claim proceeding, would prevent the statute of limitations from running. The Board concluded that, if the ALJ determines that the subsequent claim is untimely filed, then "he must give claimant the opportunity to prove that extraordinary circumstances exist that may preclude the dismissal of the claim. 20 C.F.R. § 725.308(c)." The Board issued a related decision in *Abshire v. D&L Coal Co.*, 22 B.L.R. 1-___, BRB No. 01-0827 BLA (Sept. 30, 2002)(en banc), a case also arising in the Sixth Circuit.

¹⁵ On October 24, 2002, the Director filed a *Motion for Reconsideration* of the Board's decision in *Furgerson* and cited to the Sixth Circuit's unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 2002 WL 31205502 (6th Cir. Oct. 2, 2002) (unpub.) to argue that the Board's reliance on *Kirk* was error. On October 21, 2002, the Director also filed a *Motion for Publication of Unpublished Opinion* with the Sixth Circuit and requested that the court's decision in *Dukes* be published.

Chapter 25

Principles of Finality

I. Appellate decisions

C. Law of the case

Citation correction: *United States v. U.S. Smelting, Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g. denied*, 339 U.S. 972 (1950).

III. Res judicata and collateral estoppel

B. Collateral estoppel

2. Examples of application

f. Miner's and survivor's claims—existence of pneumoconiosis

In *Collins v. Pond Creek Mining Co.*, ___ B.L.R. ___, Case No. 02-0329 BLA (Jan. 28, 2003), the Board held that, generally, an employer is collaterally estopped from re-litigating the issue of whether pneumoconiosis is present if (1) there is a prior decision awarding benefits in a miner's claim, and (2) no autopsy is performed in the survivor's claim. However, the Board upheld the ALJ's denial of application of collateral estoppel where, "the miner . . . was awarded benefits on February 25, 1988, at which time evidence sufficient to establish pneumoconiosis under one of the four methods set out at Section 718.202(a)(1)-(4) obviated the need to do so under any of the other methods." The ALJ properly noted that, since the award of miner's benefits, the Fourth Circuit issued *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) requiring that all types of evidence be weighed together to determine whether the disease is present. As a result, the Board held that "the issue is not identical to the one previously litigated" and collateral estoppel does not apply.

In assessing the x-ray evidence, the ALJ excluded certain interpretations submitted by Employer on grounds that the "employer had an opportunity to submit those readings in the living miner's claim." The Board held that this was error and reasoned that "[s]ince the survivor's claim is a separate claim . . . and this evidence was admitted into the record at the hearing without objection by any party pursuant to 20 C.F.R. § 725.456 (2000), it must be weighed with all other relevant evidence of record."

In *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332 (7th Cir. 2002), the court held that an employer is collaterally estopped from re-litigating the existence of coal workers' pneumoconiosis in a survivor's claim where the miner was awarded benefits based on a lifetime claim

and no autopsy evidence is presented in the survivor's claim. In this vein, the court noted the following:

Not all kinds of black lung are progressive; the milder forms of the condition do not get worse over time unless the miner inhales more dust. Yet unless pneumoconiosis sometimes goes into remission, there is no reason to hold a new hearing on the question whether a person who had that condition during life also had it at death. Zeigler does not offer us (and did not introduce before the agency) any medical evidence suggesting that black lung can be cured.

. . .

Radiologists frequently disagree about the interpretation of x-ray films; only for the most serious forms of the disease are the opacities indicative of pneumoconiosis easy to distinguish from opacities with other causes. Death offers a considerably better source of evidence: analysis of the lung tissue removed in an autopsy. The Benefits Review Board therefore has created an autopsy exception to the rule of issue preclusion. Both a mine operator and a survivor are allowed to introduce autopsy evidence in an effort to show that the determination made during the miner's life was incorrect.

As a result, the court held that, because no autopsy evidence was submitted in the survivor's claim, Employer was collaterally estopped from re-litigating the issue of whether the miner suffered from coal workers' pneumoconiosis.

By unpublished decision in *Howard v. Valley Camp Coal Co.*, BRB No. 00-1034 BLA (Aug. 24, 2001), the Board circumscribed application of collateral estoppel to preclude re-litigation of the existence of pneumoconiosis in a survivor's claim in a case arising in the Fourth Circuit. The Board stated the following:

[S]ubsequent to the issuance of the award of benefits in the miner's claim, the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3d Cir. 1997). In light of the change in law enunciated in *Compton*, . . . the issue of whether the existence of pneumoconiosis has been established pursuant to Section 718.202(a), which the administrative law judge found precluded in the survivor's claim pursuant to the doctrine of collateral estoppel, is not identical to the one previously litigated and actually determined in the miner's claim. (citations omitted). Thus, inasmuch as each of the prerequisites for application of the doctrine of collateral estoppel is not present, we hold that the doctrine of collateral estoppel is not applicable in this survivor's claim regarding the existence of

pneumoconiosis pursuant to 20 C.F.R. § 718.202(a).

As a result, the case was remanded to the administrative law judge for reconsideration of the evidence under § 718.202(a) of the regulations.

Chapter 26

Motions

VII. Dispose of a claim

A. Withdrawal

In *Clevenger v. Mary Helen Coal Co.*, ___ B.L.R. ___, BRB No. 01-0884 BLA (Aug. 30, 2002)(en banc) and *Lester v. Peabody Coal Co.*, ___ B.L.R. ___, BRB No. 02-0193 BLA (Sept. 9, 2002)(en banc), the Board held that once a decision on the merits issued by an adjudication officer¹⁶ becomes effective pursuant to 20 C.F.R. §§ 725.419, 725.479, and 725.502¹⁷, there no longer exists an “appropriate” adjudication officer authorized to approve a withdrawal request under 20 C.F.R. § 725.306.

¹⁶ The Board noted that, pursuant to 20 C.F.R. § 725.350, “adjudication officers” are district directors and administrative law judges.

¹⁷ A district director’s proposed decision and order becomes “effective” 30 days after the date of its issuance unless a party requests a revision or hearing. An administrative law judge’s decision and order on the merits becomes “effective” on the date it is filed in the office of the district director. See 20 C.F.R. §§ 725.419, 725.479, and 725.502(a)(2).

Chapter 27

Representative's Fees and Representation Issues

I. Entitlement to fees

B. Successful prosecution of the claim

1. Successful prosecution, generally

In *Kuhn v. Kenley Mining Co.*, Case No. 01-2255 (4th Cir. Apr. 4, 2002)(unpublished), the Fourth Circuit cited to 33 U.S.C. § 928(a) and 20 C.F.R. § 725.367(a) to hold that “the statute does not permit the fees of a lay representative to be shifted to an employer.”

3. Claimant's interest; adversarial proceeding

a. Prior to applicability of December 2000 regulations—precontroversion fees not awarded

In *Childers v. Drummond Co.*, ___ B.L.R. ___, BRB No. 01-0585 BLA (June 20, 2002)(en banc) (Judges McGranery and Hall, dissenting), the miner's and survivor's claims were filed prior to January 19, 2001 and, as a result, the Board denied an award of pre-controversion attorney's fees. In so holding, the Board noted that “imposition of pre-controversion attorney fees on employers may be made only where the district director has initially denied benefits, as an adversarial relationship arises at that point . . .”¹⁸ The Board further stated that, in a case where the district director initially awards benefits, a claimant cannot receive pre-controversion attorney's fees. The Board reasoned that “no adversarial relationship arises unless and until employer controverts the award and, therefore, claimant has no reason to seek professional assistance in pursuing the claim.” Moreover, the Board determined that an employer's controversion of a miner's claim is “separate and distinct” from its controversion in a survivor's claim and the controversions “do not merge.” Claimants are liable for fees incurred prior to the employer's receipt of the formal notice of claim, notice of its potential liability, and subsequent refusal to pay compensation . . .”

III. Amount of the fee award

¹⁸ The Board noted that the amended provisions at 20 C.F.R. § 725.367(a) (2001) did not apply to claims filed prior to January 19, 2001.

B. “Necessary work” defined

Sentence correction: However, in *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001), the Fourth Circuit held that it was proper to award fees to an attorney for pursuing the attorney fee award.

C. Expenses and costs

7. LEXIS research

The court in *Corsair Asset Management Inc. v. Moskovitz*, No. 1:89-CV-2116-JOF, 1992 U.S. Dist. LEXIS 6679, at *12 (N.D. Ga. Mar. 17, 1992) disallowed LEXIS online research charges stating that they are traditionally covered in office overhead expenses comparing it to the use of the law firm library.

D. The hourly rate and hours requested

2. Augmentation or enhancement based upon unique circumstances

c. Risk of loss and contingency multipliers

In *Pennsylvania v. Delaware Valley Citizen’s Council for Clean Air*, 107 S. Ct. 3078 (1987), the Supreme Court considered an award of attorney’s fees for successful prosecution of a claim under the Clean Air Act. The Court noted that “delay and the risk of nonpayment are often mentioned in the same breath” but that “adjusting for the former is a distinct issue that is not involved in this case.” The Court further stated that “[w]e do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute.” Turning to an enhancement for risk of loss, the Court held that such an enhancement under fee-shifting statutes should be utilized only under exceptional circumstances. It reasoned as follows:

[P]ayment for the time and effort involved—the lodestar—is presumed to be the reasonable fee authorized by the statute, the enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by the evidence in the record and specific findings by the courts.

Id. at 3088.

The Board has generally held that enhancement for risk of loss in black lung claims is inappropriate. See *Gibson v. Director, OWCP*, 9 B.L.R. 1-149 (1986); *Helton v. Director, OWCP*, 6 B.L.R. 1-176 (1983) (risk of loss is a constant factor in black lung litigation and is, therefore, deemed incorporated into the hourly rate).

In recent cases, the Fourth Circuit has declined to use a contingency multiplier to account for the risk of loss in black lung claims. In *Broyles v. Director, OWCP*, 974 F.2d 508 (4th Cir. 1992), the court declined to consider risk of loss to enhance a fee award and stated the following:

A multiplier is not necessary to encourage attorneys to handle black lung litigation. These cases are argued before our court almost every term. While some of these claims are unsuccessful, the claimants win a sufficient number to encourage lawyers to handle this type of litigation through the administrative proceedings and into the federal court.

Id. at 510. See also *Simkins v. Director, OWCP*, 53 F.3d 329 (4th Cir. 1995)(table); *Stollings v. Director, OWCP*, 43 F.3d 1468 (4th Cir. 1994)(table).

5. Reasonableness of the requested rate

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the court approved of an attorney's fee for Sandra Fogel based on an hourly rate of \$200.00. In support of its holding, the court noted that Ms. Fogel filed affidavits by various black lung attorneys nationwide who stated that \$200 per hour was reasonable in light of Ms. Fogel's expertise, a letter from the vice president of the local bar association stating that the fee was reasonable in the area, and the fact that Ms. Fogel was awarded that hourly rate in 22 out of 27 fee applications she filed with various ALJs and the Benefits Review Board.

In *Braenovich v. Cannelton Industries, Inc.*, ___ B.L.R. ___, BRB No. 02-0365 BLA (Feb. 12, 2003), the Board upheld an hourly rate of \$200, where the ALJ properly considered the factors at 20 C.F.R. § 725.366(b), including the "high quality" of counsel's representation, her professional credentials and experience, and the complex issues involving complicated pneumoconiosis presented in the case.¹⁹

¹⁹ Claimant was represented by the Director of the Washington and Lee University School of Law Legal Practice Clinic who was assisted by law school students.

VALIDATION OF REGULATIONS

The Department's amended black lung regulations challenged by the National Mining Association were upheld by the D.C. Circuit Court of Appeals in *National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) with the exception of a few provisions found to be impermissibly retroactive and a cost-shifting provision found to be invalid.

1. RETROACTIVITY

[a] AFFIRMED

Upon review of the challenged regulations, the court held that the following provisions were not impermissibly retroactive:

- the “treating physician rule” at 20 C.F.R. § 718.104(d) “is not retroactive because it codifies judicial precedent and does not work a substantive change in the law”;
- the amended definition of pneumoconiosis at 20 C.F.R. § 718.201(a)(2), which provides that legal pneumoconiosis may include “any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment,” is not impermissibly retroactive because it does not create any presumption that an obstructive impairment is coal dust related; rather, it is the claimant’s burden to establish that his/her restrictive or obstructive lung disease arose out of coal mine employment;
- the amended provisions at 20 C.F.R. § 718.201(c), which provide that pneumoconiosis is “recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure,” are not impermissibly retroactive. The court noted that both parties agreed that, in rare cases, pneumoconiosis is latent and progressive. As a result, the court found that the amended regulation “simply prevents operators from claiming that pneumoconiosis is never latent and progressive”;
- the provisions at 20 C.F.R. § 725.309(d), related to filing multiple claims, are not improperly retroactive; and
- the provisions at 20 C.F.R. § 725.101(a)(6), wherein the definition of “benefits” includes expenses related to the Department-sponsored medical examination and testing of the miner under § 725.406, is not impermissibly retroactive. Under the amended provisions, as with the prior version of the regulations, the Trust Fund is reimbursed by the employer for the costs of the Department-sponsored examination in the event that the claimant is successful.

[b] NOT AFFIRMED

The court did, however, remand the case for further proceedings regarding certain provisions which were impermissibly retroactive. The court defined an impermissibly retroactive regulation as applied to pending claims where “the new rule reflects a substantive change from the position taken by any of the Courts of Appeals and is likely to increase liability . . .” With this criteria in mind, the

court concluded that the following regulations are improperly retroactive:

- the “total disability rule” at 20 C.F.R. § 718.204(a) is impermissibly retroactive because the amendments provide that “an independent disability unrelated to the miner’s pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis” contrary to the Seventh Circuit’s holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994) (holding that a non-respiratory or non-pulmonary disability, such as a stroke, will preclude entitlement to black lung benefits);
- the provisions at 20 C.F.R. § 725.101(a)(31), which provide that “[a] payment funded wholly out of general revenues shall not be considered a payment under a workers’ compensation law,” are impermissibly retroactive. The court cited to a contrary decision from the Third Circuit in *Director, OWCP v. Eastern Associated Coal Corp.*, 54 F.3d 141 (3d Cir. 1995), wherein the court declined to adopt the Director’s policy of not reducing a miner’s black lung benefits by any amount s/he received from general revenues under a state occupational disease compensation act;
- the medical treatment dispute provisions at 20 C.F.R. § 725.701 are impermissibly retroactive as they create a rebuttable presumption that medical treatment for a pulmonary disorder is related to coal dust exposure contrary to the Sixth Circuit’s holding in *Glen Coal Co. v. Seals*, 147 F.3d 502 (6th Cir. 1998); and
- the amended provisions at 20 C.F.R. §§ 725.204, 725.212(b), 725.213(c), 725.214(d), and 725.219(c) and (d) are impermissibly retroactive “because they expand the scope of coverage by making more dependents and survivors eligible for benefits.”

2. ARBITRARY AND CAPRICIOUS, NOT FOUND

In addition to reviewing the regulatory amendments to determine whether they could be retroactively applied, the court also analyzed substantive changes in the following regulations and determined that they were not “arbitrary and capricious”:

- the definition of pneumoconiosis at 20 C.F.R. § 718.201(a), to include “legal” and “medical” pneumoconiosis, is proper as it “merely adopts a distinction embraced by all six circuits to have considered the issue”;
- the provisions at 20 C.F.R. § 718.201(c), which state that pneumoconiosis is recognized as a “latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure,” is not arbitrary and capricious given the government’s narrow construction of the regulation during oral argument that pneumoconiosis “may” be latent and progressive as well as a study cited at 62 Fed. Reg. 3,338, 3,344 (Jan. 22, 1997), which supports a finding that pneumoconiosis is latent and progressive “as much as 24% of the time”;
- the “change in condition” rule at 20 C.F.R. § 725.309 is not arbitrary and capricious because the burden of proof continues to rest with the claimant to demonstrate that one of the applicable conditions of entitlement has changed;
- the “treating physician rule” at 20 C.F.R. § 718.104(d) provides that a treating physician’s

opinion “may” be accorded controlling weight, but the rule is not “mandatory.” As a result, the court concluded that it did not arbitrary and capricious nor does it improperly shift the burden of proof from the claimant to the employer;

- the ‘hastening death’ rule at 20 C.F.R. § 718.205(c)(5) is not arbitrary and capricious because the regulation “nowhere mandates the conclusion that pneumoconiosis be regarded as a hastening cause of death, but only describes circumstances under which a hastening-cause conclusion may be made”;
- the responsible operator designation provisions at 20 C.F.R. § 725.495(c) are not arbitrary and capricious “[w]here, as here, the Secretary affords a mine operator liable for a claimant’s black lung disease the opportunity to shift liability to another party, it is hardly irrational to require the operator to bear the burden of proving that the other party is in fact liable”;
- the medical treatment dispute regulation at 20 C.F.R. § 725.701(e) is not arbitrary and capricious; and
- the total disability rule at 20 C.F.R. § 718.204 is not arbitrary and capricious merely because it abrogates the Seventh Circuit’s decision in *Peabody Coal Co. v. Vigna*.

3. BURDEN OF PROOF NOT IMPROPERLY SHIFTED

The court also upheld the following regulations on grounds that they did not improperly shift the burden of proof:

- the regulation at 20 C.F.R. § 725.408, which sets a deadline for an operator to submit evidence if it disagrees with its designation as the potentially liable operator, does not improperly shift the burden of proof from the Director to the employer to identify the proper responsible operator; rather, the court found that the regulation “shifts the burden of production, not the burden of proof; it requires nothing more than that operators must submit evidence rebutting an assertion of liability within a given period of time”; and
- the medical treatment dispute regulation at 20 C.F.R. § 725.701(e) does not improperly shift the burden of proof to the employer to “disprove medical coverage”; rather, “the Secretary explains that it shifts only the burden of production to operators to produce evidence that the treated disease was unrelated to the miner’s pneumoconiosis; the ultimate burden of proof remains on claimants at all times.”

4. LIMITATION OF EVIDENCE UPHELD

The court also upheld the evidence limitation rules on grounds that the Administrative Procedure Act at 5 U.S.C. § 556(d), as well as the Black Lung Benefits Act, permit the agency to exclude “irrelevant, immaterial, or unduly repetitious evidence” as “a matter of policy.” Moreover, the circuit court noted that the amended regulations afford ALJs the discretion to hear additional evidence for “good cause.” *See* 20 C.F.R. § 725.456(b)(1). The court also determined that the evidentiary limitations were not arbitrary and capricious.

5. COST SHIFTING NOT UPHELD WHERE CLAIMANT UNSUCCESSFUL

Finally, the court found that the cost-shifting regulation at 20 C.F.R. § 725.459 “invalid on its face” because it improperly permits ALJs, in their discretion, to shift costs incurred by a claimant’s production of witnesses to an employer, regardless of whether the claimant prevails. The court noted that the Secretary is authorized to shift attorney’s fees under 33 U.S.C. § 928(d) only in the event that the claimant prevails.

Regulatory provision	Case citation	Holding (valid/invalid)
725.101(a)(31)	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid, but cannot be retroactively applied
718.104(d)	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid
718.201(a)	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid
718.201(c)	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid (court noted that this provision “simply prevents operators from claiming that pneumoconiosis is never latent and progressive”)
718.204(a)	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid, but cannot be retroactively applied
725.205(c)(5)	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002); <i>Zeigler Coal Co. v. Director, OWCP [Villain]</i> , 312 F.3d 332 (7 th Cir. 2002)	valid
725.212(b), 725.213(c), 725.214(d), and 725.219(c) and (d) dependents and survivors	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid, but cannot be retroactively applied
725.309	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid

725.408	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid
725.456(b)(1)	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid
725.459	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	invalid on its face
725.495	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid
725.504	<i>Amax Coal Co. v. Director, OWCP [Chubb]</i> , 312 F.3d 882 (7 th Cir. 2002)	valid
725.701(e)	<i>National Mining Ass’n., et al. v. Dep’t. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	valid, but cannot be retroactively applied

NOTE: In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court concluded that the ALJ properly gave less weight to the opinions of Dr. Fino “based on a finding that they were not supported by adequate data or sound analysis.” Of importance, the court made reference to the comments to the amended regulations and stated the following:

Dr. Fino stated in his written report of August 30, 1998 that ‘there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.’ (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions ‘are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.’

Slip op. at n. 7.